Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
October Term 2000

Russell **BRIDENBAUGH,** Jim Davis, John Davis, Melissa Davis, William H. Friday, Gregory Kasza, Joseph Keough, Loyce Keough, David Sabbagh, John Scanlan, Linda Simon, Robert Swanson, and Martha Sykes,

Petitioners

v.

Steve **CARTER**, Attorney-General of Indiana; and Glenn Lawrence, Director of the Indiana Alcoholic Beverage Commission, in their official capacities; and Wine & Spirit Wholesalers of Indiana

Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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34 pp

QUESTION PRESENTED

Does a state law that prohibits consumers from buying wine directly from out-of-state sellers upon the same terms as they may buy from in-state sellers violate the Commerce Clause?

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The opinion and order of the District Court is reported at 78 F. Supp. 2d 828 (N.D. Ind. 1999). The opinion of the Seventh Circuit Court of Appeals is reported at 227 F.3d 848 (7th Cir. 2000).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254 to review the decision of the United States Court of Appeals for the Seventh Circuit by writ of certiorari. The decision of the Court of appeals was adverse to Petitioners and was entered on September 13, 2000. Rehearing was denied on November 6, 2000.

CONSTITUTIONAL AND STATUTORY PROVISIONS

A. **U. S. Const; Art. I, § 8** (the Commerce Clause): "The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."

B. **U.S. Const., Amend. XXI, § 2:** "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

C. **Indiana Code § 7.1-5-11-1.5 (a)**: "It is unlawful for a person in the business of selling alcoholic beverages in another state or country to ship or cause to be shipped an alcoholic beverage directly to an Indiana resident who does not hold a valid wholesaler permit under this title. This includes the ordering and selling of alcoholic beverages over a computer network.."

D. **Indiana Code § 7.1-5-1-9.5 (b)** "A person ... who knowingly violates IC 7.1-5-11-1.5 commits a Class D felony."

STATEMENT OF THE CASE

A. Facts.

Plaintiffs are wine consumers. They are Indiana residents over the age of twenty-one who enjoy drinking and collecting wine. Some of the wine they would like to buy is only available from out-of-state sources, such as small wineries and auction houses. Although these wines are readily available by mail-order or over the

Internet, Indiana law[1] prohibits such direct transactions between consumers and out-of-state retailers, and requires consumers to buy their wine only from in-state sellers. Indiana is one of more than twenty states which have laws protecting local wine retailers from Internet and mail-order competition by prohibiting out-of-state businesses from selling and delivering wine directly to in-state consumers. Plaintiffs claim that Indiana's direct shipment law discriminates against and unreasonably burdens interstate commerce. The State claims that wine is exempt from commerce clause principles because of the Twenty-first Amendment.

B. Proceedings Below

Thirteen wine consumers brought this action pursuant to 42 U.S.C. § 1983, in the United States District Court for the Northern District of Indiana, seeking a declaratory judgment that Indiana's direct shipment law was an unconstitutional violation of the Commerce Clause. The defendants are state officials charged with enforcing the law. The Indiana Wine & Spirits Wholesalers Association intervened as a defendant, asserting an economic interest in preserving their statutory monopoly. The district court had subject matter jurisdiction of this action as a federal question pursuant to 28 U.S. CODE §§ 1331 and 1343(a)(3). On cross-motions for summary judgment, Judge Allen Sharp ruled in favor of Plaintiffs and found the law unconstitutional. 78 F. Supp.2d 828 (N.D. Ind.1999). A two-judge panel of the Seventh Circuit Court of Appeals reversed on September 13, 2000, (227 F.3d 848 (7th Cir. 2000)) and entered judgment for the State.[2] The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. Petition for rehearing en banc was denied on November 6, 2000.

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[1]Indiana Code §§ 7.1-5-11-1.5(a) and 7.1-5-1-9.5 (b), set out on page 1, make direct shipments of wine from an out-of-state seller a felony. By contrast, in-state wine sellers have statutory authority to ship wine directly to private residences. E.g., Ind. Code § 7.1-3-13-3 (a) ("A wine wholesaler also may sell and deliver wine to a consumer, at the consumer's residence"); § 7.1-3-14-4 (c) ("A wine retailer is entitled to sell and deliver wine for carry out, or for at-home delivery").

[2]One judge recused himself at the start of oral argument.

REASONS FOR GRANTING THE WRIT

Plaintiffs petition for certiorari on the ground that the case involves an important federal question that has not been settled by this Court -- Does a state law that prohibits consumers from buying wine directly from out-of-state sellers upon the same terms as they may buy from in-state sellers violate the Commerce Clause?

The Seventh Circuit held that the 21st Amendment gives States power to erect barriers to competition from Internet and other out-of-state wine sellers in order to facilitate the orderly collection of taxes. We believe that holding is in error and departs significantly from this Court's recent cases state power to tax mail-order sales and the proper balance between the Twenty-first Amendment and the Commerce Clause.

I. THE CONSTITUTIONALITY OF DIRECT SHIPMENT LAWS IS AN IMPORTANT NATIONAL ISSUE

The central issue is whether Indiana may prohibit consumers from buying wine over the Internet or directly from out-of-state sellers, and require them to buy only from in-state merchants. This is an important question of constitutional balance between the Commerce Clause and the Twenty-first Amendment that has not previously been addressed by this Court. Indeed, this Court has never before heard any liquor regulation case brought by a consumer of alcoholic beverages who is adversely affected by state liquor laws.

There are more than 2100 wineries in the United States. Many of them are small and produce so little wine that no wholesaler will distribute their products nationally. These wines are available only directly from the winery. Many older vintages of wine have long since disappeared from retail shelves and are now available only at auction houses. A consumer's only access to these wines is by direct mail-order and Internet sales in which the wine is shipped from the winery or auction house directly to the consumer's residence. However, Indiana is one of more than twenty states which have laws prohibiting out-of-state businesses from shipping wine directly to consumers. The result is that Indiana consumers cannot get unusual wines not carried by their local retailers, and the economic interest

of those retailers is protected against interstate competition.

The constitutionality of these direct-shipment laws is a national issue significant enough to have been a page-one story in THE WALL STREET JOURNAL, Oct. 4, 1999, at A-1. The NEW YORK TIMES has devoted several stories to the issue.[3] Five amicus curiae briefs were filed in the Seventh Circuit in this case on behalf of an impressive list of national organizations, including four alcohol trade associations, the National Alcoholic Beverage Control Association, National Conference of State Liquor Administrators, and the Christian Coalition. Briefs were written by former Solicitor General Walter Dellinger and former White House Counsel C. Boyden Gray.

Challenges to restrictive state shipment laws are springing up around the country. There are at least six similar cases pending in United States District Courts in five different Federal Circuits::

a. *Dickerson v. Bailey*, 87 F.Supp.2d 691 (S.D. Tex. 2000)
b. *Bainbridge v. Bush*, # 99-2681-CIV-T-27E (M.D. Fla).
c. *Beskind v. Hunt*, # 3:00 CV 258 MU (W.D. N.C.).
d. *Bolick v. Roberts*, # 3:99 CV 755 (E.D. Va).
e. *Swedenburg v. Kelly*, #00 CV 778 (RMB) (S.D.N.Y.).
f. *Heald v. Engler*, #00 CV 71438 DT (E.D. Mich).

II. THE SEVENTH CIRCUIT DECISION WAS WRONG AND CONFLICTS WITH DECISIONS OF THIS COURT

The Seventh Circuit upheld the constitutionality of Indiana's direct shipment law. The decision was in error, and was arrived at only by ignoring or departing from key decisions of this Court.

Judge Easterbrook's opinion rested on three key points: 1) the Twenty-first Amendment gives states virtually unlimited power to regulate any aspect of the wine business, which overrides the dormant Commerce Clause, 2) the state has the authority to prohibit mail-order wine sales because of the difficulty in taxing them, and 3) the intent of the framers and the purpose of the 21st Amendment were irrelevant. These three statements of "law" are contrary to

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[3]N.Y. TIMES, Sep. 6, 2000, at B-3; *id.*, June 25, 2000, at § 4, p.5.

recent cases of this Court which hold that the Twenty-first Amendment and Commerce Clause are equal constitutional provisions that must be balanced, that the state *lacks* power to tax interstate mail-order sales, and that the intent and purpose of a constitutional provision is an important consideration in its interpretation.

A. The Seventh Circuit's decision that the 21st Amendment overrides the Commerce Clause conflicts with decisions from this Court requiring the two provisions to be balanced

The Seventh Circuit upheld the constitutionality of Indiana's direct shipment law by giving the 21st Amendment a broad reading and giving little or no weight to the dormant commerce clause. The first line of the opinion reads:

> This case pits the twenty-first amendment, which appears in the Constitution, against the "dormant commerce clause," which does not.

227 F.3d at 849. The court concedes that "if the product were cheese, rather than wine, Indiana would not be able to close its borders" to competition from out-of-state sellers, but because the product is wine, the 21st Amendment effectively "trumps" the dormant commerce clause. This view conflicts with the recent cases of this Court announcing that the 21st Amendment does not override the dormant Commerce Clause, but that competing interests under the two provisions must be balanced.

Since 1964, this Court has decided four cases in which a state liquor law interfered with or regulated interstate commerce. *Healey v. The Beer Institute*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964). In each, the Court rejected the view that the Twenty-first Amendment overrides the Commerce Clause, and undertook instead to balance the federal interest in promoting interstate commerce against the

state's interest in limiting alcohol sales.[4] See *Hostetter*, 377 U.S. at 331-32[5] ("To draw a conclusion ... that the Twenty-first Amendment has somehow operated to "repeal" the Commerce Clause wherever regulation of intoxicating liquors is concerned would ... be an absurd oversimplification.... patently bizarre and is demonstrably incorrect"); *Bacchus*, 468 U.S. at 276 (21st Amendment does not authorize states to favor local liquor interests by erecting barriers to competition from other states); *Brown-Forman*, 476 U.S. at 584-85 ("the Twenty-First Amendment and the Commerce Clause "each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case").[6]

The Seventh Circuit gave no weight to the consumers' interest in access to a competitive market, or the federal interest in promoting free trade between states, nor did it engage in the balancing test required by *Brown-Forman*. Instead, the panel held that a state has virtually unlimited power under the Twenty-first Amendment to regulate wine distribution. Although this view was once the prevailing law of the Brandeis Court, it has been explicitly rejected by more recent decisions of this Court, which have held that the 21st Amendment does *not* override the Commerce Clause "[w]hen a state [liquor] statute directly ... discriminates against interstate commerce, or ... favor[s] in-state economic interests over out-of-state interests,"

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[4]See *Bacchus*, 468 U.S. at 268-75; *Brown-Forman*, 476 U.S. at 578-85; *Healy*, 491 U.S. at 335-42.

[5]See also *Healey*, 491 U.S. at 334-37 (21st amendment "did not immunize the State from the Commerce Clause").

[6]See also *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 346 (1987) ("Although § 2 directly qualifies the federal commerce power, the Court has rejected the view "that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause"); *44 Liquormart, Inc v. Rhode Island*, 517 U.S. 484, 516 (1996) (the Amendment does not license the States to ignore their obligations under other provisions of the Constitution); Vijay Shanker, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-first Amendment*, 85 VA. L. REV. 353, 372-74 (1999); Sidney J. Spaeth, *The Twenty-first Amendment and State Control Over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CALIF. L. REV. 161, 184-86 (1991).

Brown-Forman, 476 U.S. at 579. The Indiana direct shipment law does both.

Even state liquor laws that regulate in-state and interstate business even-handedly are not automatically constitutional, but must be balanced to see "whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Brown-Forman*, 476 U.S. at 579. A key consideration in this balancing test is whether the state's interest could be accomplished by alternative means that do not have so significant an impact on interstate commerce. See *Camp Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 581-82 (1997); *C & A Carbonne v. Town of Clarksville*, 511 U.S. 383, 391-92 (1994). The Seventh Circuit failed to undertake this balancing analysis, never asked whether the state's legitimate interest in taxation could have been accomplished by less intrusive means than banning all direct purchases, and held for the state merely on a finding that the state's interest was minimally legitimate.

B. The Seventh Circuit's decision that a state's interest in collecting taxes overrides the Commerce Clause conflicts with recent cases of this Court

The Seventh Circuit conceded that Indiana's direct shipment law was a prima facie violation of the Commerce Clause, 227 F.3d at 851;[7] but held that the state's interest in collecting taxes on wine sales was sufficient to override the consumers' Commerce Clause claim. This decision conflicts with *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) and *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564 (1997). In both cases, this Court held that state attempts to use taxation as a reason to regulate interstate

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[7]"If the product were cheese ... Indiana would not be able ... to close its borders to imports or to insist that the shippers collect its taxes, despite the effect on its treasury..... [T]he grant of commerce power to Congress [is] a prohibition against border-closing laws..... Does § 2 [of the 21st Amendment] shield § 7.1-5-11-1.5(a) from what would otherwise be its fate under dormant commerce clause jurisprudence?" 227 F.3d at 851.

commerce was severely limited.[8]

These cases make clear that absent explicit authorization from Congress, states generally lack the power to tax mail-order and Internet sales. To be able to make a legitimate claim that it has a right to tax a mail-order sale, the state must show a nexus between the transaction and the state, including whether the out-of-state seller has a physical presence in the state, and must also look at whether the tax statute has a direct negative impact on interstate commerce. The Seventh Circuit gave no weight to the fact that Indiana's direct shipment law reaches consumer purchases made at out-of-state sellers who have no presence in the state, and that the ban obviously has a direct negative impact on interstate commerce. It merely held that because the product is wine rather than cheese, *Quill* does not apply. 227 F.3d at 851.

C. The Seventh Circuit's decision to interpret the 21st Amendment without regard to its purpose or the intent of its framers conflicts with opinions of this Court

The Seventh Circuit stated that its guide to interpreting the scope of the 21st Amendment is "the text" of the constitution, "not the 'purposes' or 'concerns' that may or may not have animated its drafters." 227 F.3d at 851. This approach conflicts with this Court's method of constitutional analysis.[9]

This Court has consistently interpreted constitutional provisions in light of their central purposes. *See, e.g., Meyer v. Grant,* 486 U.S. 414, 422 (1988) (law regulating circulating petitions analyzed with strict scrutiny because it implicated "core political speech"). The

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[8]For example, the Indiana law prohibits direct shipment of wine purchased in person by an Indiana resident at a California winery while on vacation.

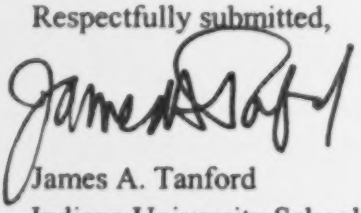
[9]As an academic debate, this so-called "textualist" approach has always been a lively subject. *Compare* Frank Easterbrook, *Statute's Domains*, 50 U.CHI.L.REV. 533, 545 (1983) *with* Richard Posner, *Statutory Interpretation — In the Classroom and in the Courtroom*, 50 U.CHI.L.REV. 800, 817-820 (1983). As a matter of law, however, Judge Easterbrook's approach is at odds with prevailing rules of constitutional interpretation.

Twenty-first Amendment is no exception, and has been consistently interpreted in light of its core purposes. *See 324 Liquor Corp v. Duffy*, 479 U.S. 335, 346 (1987) (discussing purposes of 21st Amendment, including footnote on its legislative history); *Bacchus*, 468 U.S. at 276 (the central purposes of the 21st Amendment are to promote temperance and "combat the perceived evils of an unrestricted traffic in liquor," but not to "favor local liquor industries by erecting barriers to competition"); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 713 (1984) ("the core § 2 power [is] to regulate the sale or use of liquor within its borders").

In this case, the Seventh Circuit's decision to reject conventional "core purpose" analysis directly affected the outcome. The Seventh Circuit conceded that the direct shipment law did not serve the core purposes of the 21st Amendment. However, the panel declared that observation irrelevant, ruling that it was unimportant whether the drafters were animated by the desire to promote temperance. 227 F.3d at 851. Instead, they read the text of the Amendment broadly as granting virtually unlimited power to the state to enact any kind of alcohol regulation for any purpose (including taxation).

Respectfully submitted,

February 4, 2001



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APPENDIX

The Seventh Circuit decision
Bridenbaugh v. Freeman-Wilson,
227 F.3d 848 (7th Cir. 2000) a-2

The Seventh Circuit's Order
denying rehearing a-12

The District Court Order
Bridenbaugh v. O'Bannon,
78 F.Supp.2d 828 (N.D. Ind. 1999) a-13

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on the direct shipment of wine a-19

In the United States Court of Appeals, Seventh Circuit
Nos. 00-1044, 00-1046

Russell BRIDENBAUGH, et al., Plaintiffs-Appellees,)
v.)
Karen FREEMAN-WILSON, Attorney General of)
Indiana, et al., Defendants-Appellants.)

Argued June 8, 2000 – Decided Sept. 13, 2000

Before Easterbrook and Williams, Circuit Judges*

EASTERBROOK, Circuit Judge.

This case pits the twenty-first amendment, which appears in the Constitution, against the "dormant commerce clause," which does not. Section 2 of the twenty-first amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." This directly authorizes state control over imports, while the premise of dormant commerce clause jurisprudence is an inference that the grant of power to Congress in Art. I § 8 cl. 3 implies a limitation on state authority over the same subject. We must decide how the combination of express grant and implied withdrawal of state power applies to I.C. § 7.1-5-11-1.5(a), which makes unlawful all direct shipments from out of state to Indiana consumers by any "person in the business of selling alcoholic beverages in another state or country". Several Indiana oenophiles brought suit, arguing that because the statute restricts only those sellers engaged in selling "in another state or country", it runs afoul of the dormant commerce clause. The district court held § 7.1-5-11-1.5 unconstitutional, 78 F.Supp.2d 828 (N.D.Ind.1999),

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*Circuit Judge Kanne recused himself and did not participate in the consideration or decision of this case, which is being decided by quorum of the panel. 28 U.S.C. § 46(d).

and the state officials responsible for enforcing that statute (sued on the theory of *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)), joined by intervening defendant Wine & Spirit Wholesalers of Indiana, now appeal. Before taking up the merits, we must first decide whether the plaintiffs have standing. Indiana (as we call the state defendants) points out that the only law plaintiffs challenge regulates sellers, not consumers. Section 7.1-5-11-1.5 provides:

> (a) It is unlawful for a person in the business of selling alcoholic beverages in another state or country to ship or cause to be shipped an alcoholic beverage directly to an Indiana resident who does not hold a valid wholesaler permit under this title. This includes the ordering and selling of alcoholic beverages over a computer network (as defined by IC 35-43-2-3(a)).
>
> (b) Upon a determination by the commission that a person has violated subsection (a), a wholesaler may not accept a shipment of alcoholic beverages from the person for a period of up to one (1) year as determined by the commission.

Plaintiffs are not "in the business of selling alcoholic beverages" and therefore could not violate § 7.1-5-11-1.5(a) if they tried. Indiana contends that the only proper plaintiffs are out-of-state sellers, none of which has sued. Consumers might be able to invoke the interests of third parties if the targets of the statute would have difficulty vindicating their own rights, *see Craig v. Boren*, 429 U.S. 190, 192-94, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), but enterprises in the liquor business could challenge Indiana law without impediment. Moreover, Indiana observes, other laws do target the consumer side of transactions with unauthorized sellers, and plaintiffs have chosen not to challenge those. *See* I.C. §§ 7.1-5-10-5, 7.1-5-10-7. As Indiana sees things, § 7.1-5-11-1.5 causes these plaintiffs no redressable harm, because, even if it is invalid, other laws that are not subject to any plausible constitutional challenge still would prevent plaintiffs from receiving the beverages they crave from out-of-state sellers.

Let us start with injury in fact. Before Indiana enacted § 7.1-5-11-1.5 many vintners shipped wine direct to the plaintiffs from California and other states, and they stopped as soon as § 7.1-5-11-1.5 took effect. Some of the wines plaintiffs want to drink are not carried by Indiana resellers. That establishes injury in fact. Anyone who has held a bottle of Grange Hermitage in one hand and a broken corkscrew in the other knows this to be a palpable injury. Moreover, Indiana dealers collect state excise taxes on wines that pass through their hands, while the shippers with which plaintiffs used to deal do not; this difference in price is another source of injury. Plaintiffs need not be the immediate target of a statute to challenge it. *See Allen v. Wright*, 468 U.S. 737, 758, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Plaintiffs' claim, moreover, is direct rather than derivative: every interstate sale has two parties, and entitlement to transact in alcoholic beverages across state lines is as much a constitutional right of consumers as it is of shippers--if it is a constitutional right at all.

Redressability is trickier. Plaintiffs wish to purchase wine directly from out-of-state sellers. These vendors do not have Indiana permits, yet Indiana makes holding a permit a condition to the sale of liquor to its residents. I.C. §§ 7.1-3-21-3, 7.1-3-21-5. (It is questionable whether out-of-state businesses are eligible for permits, but what matters now is that the sellers neither hold nor want permits, and plaintiffs have conceded that they would lack standing to challenge §§ 7.1-3-21-3 and 7.1-3-21-5.) Purchasing alcoholic beverages from a vendor that the consumer knows to be unlicensed by Indiana is not only a civil infraction, I.C. § 7.1-5-10-7, but also a criminal misdemeanor, I.C. §§ 7.1-5-10-5, 7.1-5-1-8. So the purchases these plaintiffs wish to make are unlawful, under statutes that they do not challenge. How, then, could a declaration that § 7.1-5-11-1.5 is invalid solve their problem?

At oral argument, plaintiffs' counsel insisted that the unchallenged sections are ambiguous, and that his clients could continue to order wine from out-of- state sellers without violating state law. That is untenable; the statutes we have cited are plain, and

plaintiffs have filed affidavits demonstrating not only purchases from unlicensed sellers but also knowledge that the sellers lack Indiana permits. Their objective in this suit is to get rid of § 7.1-5-11- 1.5 so they can get back to violating §§ 7.1-5-10-5 and 7.1-5-10-7. Laws forbidding purchases from sellers that lack Indiana permits are devilishly difficult to enforce, however, for the same reason states have insuperable problems collecting their use taxes when people buy from out-of-state vendors that do not collect sales taxes. Noncompliance is almost impossible to detect, and rampant civil disobedience ensures that a handful of prosecutions would not be effective. Private gains from violating the laws vastly exceed the anticipated legal penalties. Sellers and shippers of alcohol are fewer in number, facilitating enforcement. What is puzzling is that Indiana appears unwilling to enforce its purchaser-side laws even against consumers who proclaim and revel in their violations, as our plaintiffs do. When a state has two statutes, one effective and one ineffective, the existence of the second cannot preclude a challenge to the first, for an injunction against the first would redress the injury. *See Larson v. Valente*, 456 U.S. 228, 239-40, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982). Imagine that § A punished importing California wine with a $50 fine, while § B punished the same deed with imprisonment. Potential customers would have standing to challenge § B even though § A remained on the books, because § A would have much less effect on their conduct. This would be clear if the $50 were called a tax; it is equally so if the $50 is called a fine. Likewise, Indiana's unwillingness to enforce laws penalizing consumers who buy from unlicensed sellers means that plaintiffs have standing to challenge § 7.1-5-11-1.5(a), because it is the latter section alone that effectively blocks their purchases, which will resume if § 7.1-5-11-1.5(a) is held invalid. Plaintiffs therefore have standing. Whether it would be sound to issue an injunction designed to help scofflaws violate state statutes is doubtful, but the proper use of equitable discretion is unrelated to the requirements of Article III. Indiana does not contend that a judge should deny relief even if § 7.1-5-11-1.5(a) is unconstitutional, so we turn to the merits.

Title 7.1 of the Indiana Code establishes an elaborate regulatory

regime for the distribution of alcohol. Like most states, Indiana has chosen a three- tiered system of alcohol distribution, with different classes of permits for manufacturers, distributors, and retailers. This facilitates what appellants call "orderly market conditions"--a euphemism for reducing competition and facilitating tax collection. Direct shipments from other states undermine both of these objectives. If the product were cheese rather than wine, Indiana would not be able either to close its borders to imports or to insist that the shippers collect its taxes, despite the effect on its treasury, e.g., *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992), though it might be able to enforce its preferred system of distribution in other ways. *See, e.g., Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978). For more than a century the Supreme Court has treated the grant of commerce power to Congress as a prohibition against border-closing laws and other efforts by states to discriminate against interstate commerce. *See, e.g., Cooley v. Board of Port Wardens*, 53 U.S. (12 How.) 299, 319, 13 L.Ed. 996 (1851); *Welton v. Missouri*, 91 U.S. (1 Otto) 275, 280, 23 L.Ed. 347 (1875); *General Motors Corp. v. Tracy*, 519 U.S. 278, 287, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997). Indiana permits local wineries, but not wineries "in the business of selling ... in another state or country", to ship directly to Indiana consumers. The district court concluded that this violates the Constitution. But § 2 of the twenty-first amendment empowers Indiana to control alcohol in ways that it cannot control cheese. Does § 2 shield § 7.1-5-11-1.5(a) from what would otherwise be its fate under dormant commerce clause jurisprudence?

The parties believe that we should address this question by exploring the "core purposes" of § 2. Plaintiffs, fortified chiefly by district court cases and a student note, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment*, 85 VA. L. REV. 353 (1999), insist that the "core concern" of the twenty-first amendment is temperance. After Prohibition, a state that wanted to remain dry could use § 2 to do so. But § 7.1-5- 11-1.5(a) is hard to justify as a temperance measure--though tax collection does raise the price and thus depress the consumption of any product--and it

was on this ground that the district court held that § 2 does not authorize Indiana's law. Defendants argue that, although temperance is a "core concern," there are others, including raising revenue and "ensuring orderly market conditions." *See, e.g., North Dakota v. United States*, 495 U.S. 423, 432, 110 S.Ct. 1986, 109 L.Ed.2d 420 (1990) (plurality opinion); *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 47-48, 86 S.Ct. 1254, 16 L.Ed.2d 336 (1966), *overruled on other grounds by Healy v. Beer Institute*, 491 U.S. 324, 342-43, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989). Section 7.1- 5-11-1.5(a) furthers these other objectives, so, according to defendants, the section is authorized by the twenty-first amendment. If "core concerns" spelled the difference, we would follow the Supreme Court rather than district courts and student notes. But our guide is the text and history of the Constitution, not the "purposes" or "concerns" that may or may not have animated its drafters. Objective indicators supply the context for § 2; suppositions about mental processes are unilluminating.

Before the eighteenth amendment and the Volstead Act banned alcohol nationwide, the temperance battle was fought state by state. The movement won victories in many legislatures, and the Court held that state laws banning the production and consumption of alcohol were constitutional, *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887), but to enforce these laws states had to deal with liquor arriving from other states and nations--and their ability to do so was regularly defeated by decisions invoking the commerce clause. *See generally* OWEN M. FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910, VIII HOLMES DEVISE HISTORY OF THE SUPREME COURT 266-92 (1993); ALEXANDER M. BICKEL, THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910- 21, IX HOLMES DEVISE HISTORY OF THE SUPREME COURT 438-46 (1984). For example, when Iowa attempted to restrict importation of liquor to persons possessing a permit, the Court held this law an impermissible burden on interstate commerce. *Bowman v. Chicago & Northwestern Ry.*, 125 U.S. 465, 8 S.Ct. 689, 31 L.Ed. 700 (1888). When Iowa reacted to *Bowman* by forbidding the sale of alcohol altogether, no matter its source, it was frustrated once again. *Leisy v. Hardin*, 135

U.S. 100, 10 S.Ct. 681, 34 L.Ed. 128 (1890), held that resale is incident to importation, so that imported liquor remains an article of interstate commerce--which states could not regulate--as long as it stays in its original package. *See also Brown v. Maryland*, 25 U.S. (12 Wheat) 419, 441-42, 6 L.Ed. 678 (1827). (The original-package doctrine has been jettisoned, *see Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976), but it remains vital to understanding the twenty-first amendment.) The combination of *Leisy* and *Mugler* meant that states could forbid domestic production of alcoholic beverages but could not stop imports; the Constitution effectively favored out-of-state sellers.

Leisy invited Congress to eliminate this anomaly, see 135 U.S. at 108, 10 S.Ct. 681, and Congress took up the invitation. The Wilson Act, 26 Stat. 313 (1890), em-powered states to regulate imported liquor "to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." This Act eliminated the privileged status of interstate sellers but did not authorize discrimination against them. *See Scott v. Donald*, 165 U.S. 58, 17 S.Ct. 265, 41 L.Ed. 632 (1897). It reversed the result of Leisy and empowered states to regulate the sale of all liquor, imported or domestic. But one problem remained: shipments direct from out-of-state sellers to consumers. *In re Rahrer*, 140 U.S. 545, 11 S.Ct. 865, 35 L.Ed. 572 (1891), held that Congress may authorize state laws regulating liquor imports, but the Court construed the Wilson Act in light of dormant-commerce-clause jurisprudence to leave Bowman untouched, so that although states could regulate resale of imported liquor in its original package, states were still powerless against interstate shipments direct to consumers. *See Rhodes v. Iowa*, 170 U.S. 412, 18 S.Ct. 664, 42 L.Ed. 1088 (1898); *Vance v. W.A. Vandercook Co.*, 170 U.S. 438, 452, 18 S.Ct. 674, 42 L.Ed. 1100 (1898).

Could Congress empower states to create non-uniform rules governing direct shipments, like the statute challenged in this case? *Rhodes* and *Vance* implied a negative answer--that Congress could

not "delegate" its commerce power to the states, see *Cooley*, 53 U.S. (12 How.) at 318--leading the national government to exercise national power by piggybacking state prohibitions onto a federal prohibition: "[T]he shipment or transportation [into a state] ... of any ... liquor ... [which] is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State ... is hereby prohibited." By the time this law, the Webb-Kenyon Act, 37 Stat. 699 (1913), was held constitutional by *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311, 37 S.Ct. 180, 61 L.Ed. 326 (1917), the temperance movement had the upper hand and the eighteenth amendment was soon ratified.

America changed course in 1933 and repealed the eighteenth amendment by § 1 of the twenty-first. But the twenty-first amendment did not return the Constitution to its pre-1919 form. Section 2 tracks the Webb- Kenyon Act and effectively incorporates its approach into the Constitution. Like the Webb-Kenyon Act, § 2 incorporates state prohibitions into a federal rule; like the Webb-Kenyon Act, § 2 closes the loophole left by the dormant commerce clause, abetted by *Bowman* and *Rhodes*: direct shipments from out-of-state sellers to consumers that bypass state regulatory (and tax) systems. No longer may the dormant commerce clause be read to protect interstate shipments of liquor from regulation; § 2 speaks directly to these shipments. Indeed, all "importation" involves shipments from another state or nation. Every use of § 2 could be called "discriminatory" in the sense that plaintiffs use that term, because every statute limiting importation leaves intrastate commerce unaffected. If that were the sort of discrimination that lies outside state power, then § 2 would be a dead letter.

No decision of the Supreme Court holds or implies that laws limited to the importation of liquor are problematic under the dormant commerce clause. What the Court has held, however, is that the greater power to forbid imports does not imply a lesser power to allow imports on discriminatory terms. *See Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986). Immediately after the

amendment's ratification the Supreme Court tolerated discriminatory regulation, *see California Board of Equalization v. Young's Market Co.*, 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38 (1936); *Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U.S. 391, 394, 59 S.Ct. 254, 83 L.Ed. 243 (1939), but more recently the Court held a discriminatory tax invalid. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984) ("The central purpose of [§ 2] was not to empower States to favor local liquor industries by erecting barriers to competition."). Cases such as *Brown- Forman* and *Bacchus* apply an unconstitutional-conditions approach to use of the § 2 power. They treat § 2 as eliminating economic discrimination against in-state commerce of the sort caused by *Leisy, Bowman*, and the original package doctrine, without authorizing discrimination against out-of- state sellers. Like the Wilson Act and the Webb-Kenyon Act before Prohibition, § 2 enables a state to do to importation of liquor--including direct deliveries to consumers in original packages--what it chooses to do to internal sales of liquor, but nothing more.

Indiana Code § 7.1-5-11-1.5(a), like the statute in Bowman, regulates importation. And the shipments it regulates, direct shipments to consumers, are precisely the sort that prompted the Webb-Kenyon Act, the forefather of § 2. Section 2 thus authorizes I.C. § 7.1-5-11-1.5(a) unless the state has used its power to impose a discriminatory condition on importation, one that favors Indiana sources of alcoholic beverages over sources in other states, as Hawaii did in *Bacchus*. Plaintiffs contend that § 7.1-5-11-1.5(a) discriminates in this fashion, but we do not see how. Indiana insists that every drop of liquor pass through its three-tiered system and be subjected to taxation. Wine originating in California, France, Australia, or Indiana passes through the same three tiers and is subjected to the same taxes. Where's the functional discrimination? Plaintiffs observe that holders of Indiana wine wholesaler or retailer permits may deliver directly to consumers' homes. See § § 7.1-3-13-3(a), 7.1-3-14-4(c). But these permit holders may deliver California and Indiana wines alike; firms that do not hold permits may not deliver wine from either (or any) source; and even an Indiana citizen

that is "in the business of selling alcoholic beverages in another state or country" is forbidden by § 7.1-5-11-1.5(a) to deliver wine directly from out of state to a consumer in Indiana, no matter the wine's source. (An Indiana citizen holding an Indiana permit may not, for example, make direct deliveries of Indiana's, or any other state's, wines from a warehouse in Illinois. The wine must be reimported through an Indiana wholesaler or retailer.)

This regime has its anomalies. An Indiana wine retailer, holding an appropriate permit, that is also "in the business of selling alcoholic beverages" in Illinois, is permitted to ship directly to Indiana consumers by § 7.1-3-14-4(c), and forbidden to do so by § 7.1-5-11-1.5. Indiana's judiciary has yet to consider how, if at all, these statutes may be reconciled. Nor need we try to do so. Though this conflict may bedevil wholesalers and retailers, plaintiffs are consumers, and the statutory conflict does not disable any wholesaler from importing liquor to Indiana and reselling to consumers. Plaintiffs do not complain about the statute that apparently limits distribution permits to Indiana's citizens. These plaintiffs are concerned only with direct shipments from out-of-state sellers who lack and do not want Indiana permits.

So far as these plaintiffs are concerned, the main effect of Indiana's system is to subject their purchases to taxation, by requiring the beverages to pass through the hands of permit holders whose business is closely monitored to ensure tax collection. Sellers that quit shipping to plaintiffs after § 7.1-5-11-1.5 took effect have admitted in affidavits that they never paid a dollar of Indiana excise taxes. This situation resembles that created by *Bowman, Leisy, Rhodes, Vance*, and the original package doctrine a century ago, when states discriminated against in-state sellers, because they could not effectively govern direct shipments from elsewhere. Congress adopted the Webb-Kenyon Act, and later proposed § 2 of the twenty-first amendment, precisely to remedy this reverse discrimination and make alcohol from every source equally amenable to state regulation. Section 7.1-5-11-1.5 has one real economic effect on out-of-state sellers who neither have nor seek Indiana permits: it channels their sales through Indiana permit-holders, enabling Indiana to collect its

excise tax equally from in-state and out-of-state sellers. As the history of the twenty-first amendment confirms, this is precisely what § 2 is for.

The judgment is reversed, and the case is remanded with instructions to enter judgment for defendants.

In the United States Court of Appeals, Seventh Circuit
Nos. 00-1044, 00-1046

Russell BRIDENBAUGH, et al., Plaintiffs-Appellees,)
v.)
Karen FREEMAN-WILSON, Attorney General of)
Indiana, et al., Defendants-Appellants.)

November 6, 2000
Before Easterbrook and Williams, Circuit Judges

Order

Plaintiffs-appellees filed a petition for rehearing and petition for rehearing en banc on September 27, 2000. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition is therefore DENIED

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION
No. 3:98 CV 0464 AS

RUSSELL BRIDENBAUGH, et al.,)
Plaintiffs,)
v.)
FRANK O'BANNON, Governor of Indiana,[1] et al.,)
Defendants,)
and)
WINE & SPIRIT WHOLESALERS OF INDIANA,)
Intervenor-Defendants.)

78 F. Supp. 2d 828
December 10, 1999, Decided

OPINION: MEMORANDUM AND ORDER

The complaint in this case was originally filed by Plaintiffs on August 28, 1998 invoking this Court's Federal jurisdiction by asserting that certain statutes relating to the distribution of alcoholic beverages in Indiana were in violation of the Commerce Clause in Article I of the Constitution of the United States. The case has now been pending for over a year. All relevant issues have been fully briefed and interesting and helpful oral argument was heard in South Bend, Indiana on December 6, 1999. The case is now ripe for ruling on the parties' cross motions for summary judgment.

Plaintiffs brought this suit to challenge the constitutionality of Indiana Statute section 7.1-5-11-1.5 which became effective in August, 1998 and made it unlawful for persons in another state or country to ship an alcoholic beverage directly to an Indiana residence.[2] Plaintiffs assert that the new statute violates the

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[1]The Governor was dismissed from this action by Court Order of April 6, 1999.

[2] The text of the relevant statue provides as follows:

Commerce Clause as it deprives them of their constitutional right to engage in interstate commerce without undue interference by state law.

Plaintiffs are all Indiana residents over the age of twenty-one. Plaintiffs state that they are all "wine collectors," and that Plaintiff Bridenbaugh is also a professional wine critic and journalist. Prior to the enactment of the statute, plaintiffs all purchased out of state wines from wineries, wine clubs and other sources and were able to have those wines shipped directly to their residences. Additionally, various sources frequently sent free wine samples to Bridenbaugh so that he could critique them and write a review. Since the statute became effective plaintiffs claim they are hampered in their wine collecting because many of the wines they seek to purchase are unavailable in Indiana stores. Additionally, plaintiffs assert that they are now unable to purchase wines while traveling and have the purchase shipped home. Finally, plaintiff Bridenbaugh claims the statute interferes with his ability to engage in his profession.[3]

> (a) It is unlawful for a person in the business of selling alcoholic beverages in another state or country to ship or cause to be shipped an alcoholic beverage directly to an Indiana resident who does not hold a valid wholesaler permit under this title. This includes the ordering and selling of alcoholic beverages over a computer network (as defined by IC 35-43-2-3(a)).
>
> (b) Upon a determination by the commission that a person has violated subsection (a), a wholesaler may not accept a shipment of alcoholic beverages from the person for a period of up to one (1) year as determined by the commission.

A related statute referred to by defendants criminalizes a violation of the above the above statute and provides that "a person who is not an 'in state or an out of state vintner, distiller, brewer, rectifier, or importer that holds a basic permit from the federal Bureau of Alcohol, Tobacco, and Firearms' and who knowingly violates IC 7.1-5-11-1.5 (the challenged statute here) commits a Class D felony." See I.C. 7.1-5-1-9.5(b).

[3]Bridenbaugh is a magazine "wine critic" and as a result must sample and rates various wines. There does not appear to be a problem with the standing of these plaintiffs, or at least some of them, to challenge this statute. This issue was fully addressed by this Court. See Court Order of April 16, 1999.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper if the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Russo v. Health, Welfare & Pension Fund, Local 705, 984 F.2d 762 (7th Cir. 1993).* The initial burden is on the moving party to demonstrate, "with or without supporting affidavits," the absence of a genuine issue of material fact and that judgment as a matter of law should be granted in the moving party's favor. *Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* (quoting Fed. R. Civ. P. 56). A question of material fact is a question which will be outcome determinative of an issue in the case. The Supreme Court has instructed that the facts material in a specific case shall be determined by the substantive law controlling the given case or issue. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).* Once the moving party has met the initial burden, the opposing party must "go beyond the pleadings" and "designate 'specific facts shows that there is a genuine [material] issue for trial.'" Id. The nonmoving party cannot rest on its pleadings, *Waldridge v. American Hoechst Corp., 24 F.3d 918, 920-21 (7th Cir. 1994); Hughes v. Joliet Correctional Ctr., 931 F.2d 425, 428 (7th Cir. 1991),* nor may that party rely upon conclusory allegations in affidavits. *Cusson-Cobb v. O'Lessker, 953 F.2d 1079, 1081 (7th Cir. 1992).*

Where, as here, cross-motions for summary judgment have been submitted by the parties, the court is not required to grant judgment as a matter of law for one side or the other. *Heublein, Inc. v. United States, 996 F.2d 1455, 1461 (2d Cir. 1993); Judsen Rubber Works, Inc. v. Manufacturing, Prod. & Serv. Workers Union Local No. 24, 889 F. Supp. 1057, 1060 (N.D. Ill. 1995).* Rather, the court must evaluate each party's motion on its own merits, resolving factual uncertainties and drawing all reasonable inferences against the party whose motion is under consideration. *Heublein, 996 F.2d at 1461; Judsen, 889 F. Supp. at 1060; Buttitta v. City of Chicago, 803 F. Supp. 213, 217 (N.D. Ill. 1992),* aff'd, *9 F.3d 1198 (7th Cir. 1993).*

Applying this standard the Court addresses the cross-motions for summary judgment.

DISCUSSION

Conceptually, this case involves the interplay between the reserved police power of the states under both the Tenth and Fourteenth Amendments of the Constitution of the United States with the Commerce Clause, and more particularly, with the second section of the Twenty-First Amendment which provides:

> Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
>
> Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.
>
> Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

U.S.C. Amend. XXI.

This court can take judicial notice of the historic setting of the this Amendment, which brought to an end national prohibition once described by Herbert Hoover as "A Noble Experiment." Clearly, the second section of this Amendment had as its legislative purpose to permit states to regulate by local option, or indeed enforce statewide prohibition in regard to alcoholic beverages. Neither of those concepts have any bearing whatsoever to this case. This Court conceives this case as a straight forward application of the Commerce Clause as it may apply to state authority to regulate this particular species of commerce.

This Court is in complete agreement with the suggestion made by Judge Edith Jones in *Cooper v. McBeath, 11 F.3d 547 (5th Cir. 1994),* cert. denied by *McBeath v. Cooper, 512 U.S. 1205, 114 S. Ct. 2675, 129 L. Ed. 2d 810 (1994),* that the Twenty-First Amendment does not necessarily immunize state liquor control laws from invalidation under the commerce clause. The chief question is

whether the interests implicated by a state's regulation are so closely related to the powers reserved by the Amendment that the regulation may prevail, notwithstanding the fact that its requirements directly conflict with express federal policy. *11 F.3d 547, 555* (quoting *Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714, 104 S. Ct. 2694, 2708, 81 L. Ed. 2d 580 (1984)).* See also *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980).* "One thing is certain: The central purpose of the [Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition." *Bacchus Imports v. Dias, 468 U.S. 263, 104 S. Ct. 3049, 82 L. Ed. 2d 200 (1984).* Cases such as Capital Cities and Bacchus demonstrate, the key aspect of the accommodation test is the determination of whether the law was passed under a core *Twenty-First Amendment power. 467 U.S. 691, 104 S. Ct. 2694, 81 L. Ed. 2d 580; 468 U.S. 263, 104 S. Ct. 3049, 82 L. Ed. 2d 200.* Thus, evaluating any state alcohol regulation requires an understanding of just what the Twenty-First Amendment's core powers are. Recent lower court cases have demonstrated that temperance is the core purpose of the Twenty-First Amendment. *Quality Brands v. Barry, 715 F. Supp. 1138 (D. D.C. 1989),* aff'd *284 U.S. App. D.C. 78, 901 F.2d 1130 (D.C. Cir. 1990); Loretto Winery v. Gazzara, 601 F. Supp. 850, 861* (S.D. N.Y.), aff'd and modified as to remedy sub nom. *Loretto Winery v. Duffy, 761 F.2d 140 (2d Cir. 1985)); Cooper, 11 F.3d 547.* This Court is greatly impressed with the reasoning of the Fifth Circuit in regulating alcoholic beverages in Texas and believes that the reasoning applies here. Thus, it is the conclusion of this Court that the State of Indiana cannot look to the Twenty-First Amendment for the constitutional salvation of the state statutes in question.

Although numerous decisions of the Supreme Court have been cited there are some salient decisions that need to be discussed. It's no secret that *Gibbons v. Ogden, 22 U.S. 1, 6 L. Ed. 23* (9 Wheat.) (1824), fundamentally went off on the question of federal supremacy of a federal statute under Article VI of the Constitution. There is no such federal statute involved here. No one is here arguing that the United States Congress has preempted state acholic beverage

regulation. The statutes here in question can only be saved under the reserved police power of the state, and in this case, that is not enough. For whatever reason, the General Assembly of Indiana has chosen to discriminate as between in state (Indiana) and out of state purveyors of alcoholic beverages. The Deputy Attorney General arguing this case seemed to place most of his eggs in the "permit" basket saying that in order to engage in this kind of distribution, one must have an Indiana permit. The flaw in this argument is that permits simply are not granted to out of state distributors and at that point, there is an interference with interstate commerce that cannot be gainsaid under the Commerce Clause.

This court is now, and has always been, greatly reluctant to wield the Federal Constitution ax against State legislation. See dissent of first Justice Harlan in *Civil Rights Cases of 1883, 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835 (1883).* But here, that result is inescapable because these statutes on their face discriminate against out of state commerce. This clearly violates the Commerce Clause of the Federal Constitution. The actions of the General Assembly of Indiana. here go well beyond the simple kind of police power regulation authorized by the Taney court in *New York v. Miln, 36 U.S. 102, 9 L. Ed. 648* (11 Pet.) (1837). Likewise, this state regulation is also different than the one approved by Justice Curtis in *Cooley v. Board of Wardens, 53 U.S. 299, 13 L. Ed. 996* (12 How.) (1851). Although not particularly relevant to modern times, the early reasoning and result of Chief Justice Fuller in *Leisy v. Hardin, 135 U.S. 100, 10 S. Ct. 681, 34 L. Ed. 128 (1890),* now that the nation has been through national prohibition and its repeal, may say more about the dimensions of the Commerce Clause and the dispensing of intoxicating liquors than once was imagined. In purely modern conceptual terms the state here is clearly acting as a market regulator and not as a market distributor. In *New England Power Co. v. New Hampshire, 455 U.S. 331, 102 S. Ct. 1096, 71 L. Ed. 2d 188 (1982),* the court clearly reaffirmed the view that the Commerce Clause precludes a state giving residents a preferred right of access to its natural resources or products derived therefrom. While this case does not involve a natural resource, it is a case where the state has given

preferred treatment to its residents over non-residents. For all of these reasons, this Court has no choice but to declare these Indiana statutes in conflict with the Commerce Clause in Article I of the Constitution.[4]

CONCLUSION

Judgement shall accordingly enter for Plaintiffs and against Defendants. Each party will bear its own costs.

SELECTED INDIANA STATUTES

§ 7.1-5-1-9.5. Violation of IC 7.1-5-11-1.5 -- Penalties

(a) An in state or an out of state vintner, distiller, brewer, rectifier, or importer that holds a basic permit from the federal Bureau of Alcohol, Tobacco, and Firearms who knowingly violates IC 7.1-5-11-1.5 commits a Class A misdemeanor.

(b) A person who is not described in subsection (a) who knowingly violates IC 7.1-5-11-1.5 commits a Class D felony.

(c) If the chairman of the alcoholic beverage commission or the attorney general determines that a vintner, distiller, brewer, rectifier, or importer that holds a basic permit from the federal Bureau of Alcohol, Tobacco, and Firearms has made an illegal shipment of an alcoholic beverage to consumers in Indiana, the chairman shall notify the federal Bureau of Alcohol, Tobacco, and Firearms in writing and by certified mail of the official determination that state law has been violated and request the federal bureau to take appropriate action.

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[4] This result is fully exlicated and supported by a careful, in depth discussion in Vijay Shanker, *Alcohol Direct Shipment Laws, The Commerce Clause and the Twenty First Amendment*, 85 VA. L. REV. 353 (March 1999). A single concluding sentence there is highly relevant here: "There is only one reason to distinguish alcohol from other commodities in terms of federal power over interstate commerce: the state's interest in promoting temperance." *Id.* at 382. Temperance is not the issue in the case now before this Court.

§ 7.1-5-11-1.5. Shipping alcoholic beverage to Indiana resident who does not hold wholesaler permit prohibited -- Effect on shipper -- Rules

(a) It is unlawful for a person in the business of selling alcoholic beverages in another state or country to ship or cause to be shipped an alcoholic beverage directly to an Indiana resident who does not hold a valid wholesaler permit under this title. This includes the ordering and selling of alcoholic beverages over a computer network (as defined by IC 35-43-2-3 (a)).

(b) Upon a determination by the commission that a person has violated subsection (a), a wholesaler may not accept a shipment of alcoholic beverages from the person for a period of up to one (1) year as determined by the commission.

(c) The commission shall adopt rules under IC 4-22-2 to implement this section.

§ 7.1-3-13-3. Scope of wine wholesaler's permit

(a) The holder of a wine wholesaler's permit may ... sell and deliver wine to a consumer, at the consumer's residence, in bottles or other permissible containers in a quantity that does not exceed fifty (50) gallons at any one (1) time.

§ 7.1-3-14-4. Scope of wine retailers permit

(a) The holder of a wine retailer's permit is entitled to ...sell wine to a customer and deliver it in permissible containers to the customer on the licensed premises or to the customer's house.

MOTION FILED

MAR 2 2 2001

No. 00-1323

In The

Supreme Court of the United States

RUSSELL BRIDENBAUGH, JIM DAVIS, JOHN DAVIS, MELISSA DAVIS, WILLIAM H. FRIDAY, GREGORY KASZA, JOSEPH KEOUGH, LOYCE KEOUGH, DAVID SABBAGH, JOHN SCANLAN, LINDA SIMON, ROBERT SWANSON, MARTHA SYKES,

Petitioners,

v.

STEVE CARTER, Attorney General of Indiana; and GLENN LAWRENCE, Director of the Indiana Alcoholic Beverage Commission, in their official capacities; and WINE & SPIRIT WHOLESALERS OF INDIANA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

MOTION BY THE COALITION FOR FREE TRADE FOR LEAVE TO FILE AS AMICUS CURIAE AND BRIEF AMICUS CURIAE IN OPPOSITION TO CERTIORARI

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Motion for Leave to File Brief Amicus Curiae

Applicant, Coalition for Free Trade, hereby respectfully moves for leave to file the attached brief amicus curiae in opposition to the petition for writ of certiorari.[1]

The consent of counsel for the Petitioners was requested and denied. The consent of the Indiana Attorney General's Office, representing the respondent state actors, was obtained. The consent of counsel for Respondent, Wine & Spirit Wholesalers of Indiana, was obtained. The written consents of both are on file with the clerk's office.

Interest of Amicus

The Coalition for Free Trade (CFT) is a California nonprofit corporation formed exclusively for the purpose of addressing the issue of interstate wine shipments to consumers. Its sole mission is to legalize the shipment of wine between licensed wine sellers, such as wineries and wine retailers, and out-of-state consumers. CFT is predominately a winery supported organization although wholesalers, e-commerce and traditional "bricks and mortar" retailers contribute to its efforts.

Both the Petitioners and CFT have the same goal of removing discriminatory trade barriers that prohibit consumers from receiving wine from out-of-state wineries and out-of-state retailers for personal consumption. In

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[1] No counsel for a party authorized this Brief in whole or in part, and no person or entity, other than the Amicus Curiae, made a monetary contribution to the preparation or submission of this Brief.

the Seventh Circuit, CFT filed an amicus brief in support of the Petitioners.

CFT now files this motion and the attached brief in **opposition** to certiorari reluctantly and only after due consideration of the district court and court of appeals records in this case. CFT argues in its brief that a writ of certiorari should not be granted in this case for the following reasons. First, as a prudential matter, the absence of out-of-state wineries and out-of-state wine retailers as plaintiffs makes this case a poor candidate for review by the Court.[2] Second, the record facts in this case are insufficient for purposes of reviewing the delicate interplay between the Commerce Clause and the Twenty-first Amendment. Moreover, the question of interstate wine shipments to consumers would benefit from further development in the district courts and courts of appeal. At present, no conflict exists between the circuits. Six other cases are pending in the district courts regarding this question. Five out of the six cases include out-of-state wineries as plaintiffs. In several of these cases, there has been extensive discovery and fact development relating to the economic and legislative issues not addressed in this case.

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[2] Ancillary jurisdictional issues present may also hamper a consideration on the merits.

WHEREFORE, the Coalition for Free Trade respectfully seeks leave of this Court to file the attached brief in opposition to the petition for writ of certiorari.

Respectfully submitted,

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INTEREST OF AMICUS

The Coalition for Free Trade (CFT) is a California nonprofit corporation formed exclusively for the purpose of addressing the issue of interstate wine shipments to consumers. Its sole mission is to legalize the shipment of wine between licensed wine sellers, such as wineries and wine retailers, and out-of-state consumers. CFT is predominately a winery-supported organization although wholesalers, e-commerce and traditional "bricks and mortar" retailers contribute to its efforts.

Both the Petitioners and CFT have the same goal of removing discriminatory trade barriers that prohibit consumers from receiving wine from out-of-state wineries and out-of-state wine retailers for personal consumption. In the Seventh Circuit, CFT filed an amicus brief in support of the consumer petitioners. While CFT continues to support the Petitioners' goal, a review of the record in this case recommends the Petition be denied.

ARGUMENT

FOR PRUDENTIAL REASONS THIS CASE IS NOT A SUITABLE CANDIDATE FOR EXAMINING THE DELICATE INTERPLAY BETWEEN THE COMMERCE CLAUSE AND THE TWENTY-FIRST AMENDMENT AND CERTIORARI THEREFORE SHOULD BE DENIED.

This case is a consumer challenge to two Indiana statutes that make it unlawful for out-of-state wineries and out-of-state wine retailers to *ship* wine directly to consumers who reside within the state of Indiana. Ind.

Code §§ 7.1-5-11-1.5, 7.1-5-1-9.5. The challenged statutes, however, do not make it unlawful for Indiana consumers to *receive* wine from out-of-state wineries or out-of-state wine retailers.[1] The plaintiffs (i.e. petitioners herein) are thirteen adult, wine-consuming residents of the state of Indiana. No out-of-state winery or out-of-state wine retailer is a party to this case. The defendants (i.e. respondents herein) are the appropriate Indiana state officials, *Ex Parte Young*, 209 U.S. 123 (1908), and the intervening defendant Wine & Spirits Wholesalers of Indiana.

Petitioners assert this case presents "an important federal question that has not been settled by this Court." (Pet. at 3). Importance pursuant to Supreme Court Rule 10, however, is a relative concept and one that escapes easy formulation. "The concept of importance relates, of course, to the importance of the issue 'to the public as distinguished from' importance to the particular 'parties' involved." Robert L. Stern et al., *Supreme Court Practice*, 184 (7th ed. 1993), citing, *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923); *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955). "There are . . . a wide variety of considerations which may be pertinent in testing the importance of a case." *Stern, id.* One of those considerations is whether the case will provide an adequate framework for deciding an issue so the public may benefit from its decision and not merely the parties.[2]

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[1] There are other statutes that prohibit the consumer side of the transaction, Ind. Code §§ 7.1-5-10-5, 7.1-5-10-7, but the Petitioners have not sought to challenge those statutes. *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 849 (7th Cir. 2000).

[2] Parenthetically, the district court did not enter an injunctive order or a declaration of rights providing relief to the

This case does not provide a suitable framework for deciding the question presented for two reasons. First, there are no out-of-state winery or out-of-state wine retailer plaintiffs. Their participation, as a prudential matter, is necessary for a full review of the diverse economic and constitutional injuries resulting from the challenged Indiana statutes. Second, the record facts are insufficient for the Court's review of the question presented.

1. As a Prudential Matter, the Absence of An Out-of-State Winery or Out-of State Wine Retailer As a Plaintiff Makes This Case Unsuitable for Review by The Court.

The record below is suggestive of performing *Hamlet* without the prince. It is not only the protagonist that is missing; it is everything that flows from him. The missing character in this instance is a representative out-of-state winery or out-of-state wine retailer that desires to sell to the petitioners but cannot do so due to the presence of Indiana's discriminatory trade barrier. The absence of these necessary parties has left the record sparse, the issues clouded,[3] and the constitutional and economic injuries sustained by the out-of-state wineries and wine retailers unexamined.

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plaintiffs. It merely entered judgment. *Bridenbaugh v. O'Bannon*, 78 F. Supp.2d 828, 832 (N.D. Ind. 1999).

[3] The presence of certain ancillary jurisdictional issues may hamper consideration of the merits.

Traditionally, the out-of-state business is the target of the discrimination and the one who suffers the most readily discernible constitutional and economic injuries. It is also the out-of-state business that knows the most about the underlying facts and is in the best position to crystallize the issues. In this instance it is the small winery, without adequate distribution or market access, and the independent wine retailer, who has embraced e-commerce, that have suffered the most as targets of the challenged statutes. Approximately one thousand five hundred (1500) small, family-owned wineries throughout the United States rely upon retail sales to out-of-state consumers for economic viability and growth. An unknown number of wine retailers also depend on selling and shipping wine to out-of-state consumers as a significant source of revenue. While these businesses would be the most affected by a decision in this case, their absence has precluded development of a complete set of facts and formulation of a more narrowly crafted question on certiorari.[4]

Without the benefit of an out-of-state winery or out-of-state wine retailer as a plaintiff, the district court was

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[4] The absence of any out-of-state winery as a plaintiff was noted in the appeals court. *Bridenbaugh v. Freeman-Wilson*, supra, 849. The appeals court, however, erred in assuming the out-of-state wineries were not interested in obtaining Indiana permits in order to legally sell and ship wine to Indiana consumers. *Id.* at 854. Contrary to the court's comment, the wineries care a great deal about permits. Two winery organizations, the Coalition for Free Trade and Family Winemakers of California, submitted amici briefs endorsing model legislation that requires out-of-state wineries and out-of-state wine retailers to obtain permits and pay state excise taxes.

denied the opportunity to develop and analyze the facts in a meaningful way. The out-of-state wineries and out-of-state wine retailers most affected by the discrimination were unable to place facts in the record or refute the defenses raised by the Respondents. Eventual resolution of this question by the Court will require a more thorough district court analysis of the economic burden placed upon out-of-state wineries and wine retailers by such statutes and the constitutional injuries sustained.

2. The Record is Insufficient for Review by the Court.

This case is a *bare* facial challenge to the offending statutes. Unlike the extensive factual records in such well known Twenty-first Amendment cases as *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) and *Healy v. The Beer Institute*, 491 U.S. 324 (1989), there are few facts in this record beyond those necessary to demonstrate Article III standing and the state's disparate treatment of out-of-state wineries and wine retailers. Absence of an adequate factual record lends this case to advisory comments and great mischief. The record is simply insufficient for purposes of reviewing the delicate interplay between the Commerce Clause and the Twenty-first Amendment as it relates to wine shipments between out-of-state wine sellers and in-state consumers.

An examination of the district court record reveals the Petitioners developed few record facts concerning out-of-state wineries. The most notable of these facts were those appearing in the petition. (i.e., *"Some of the wine they would like to buy is only available from out of state*

sources such as small wineries and auction houses," [Pet. at 1] and, *"Many of them are small and produce so little wine that no wholesaler will distribute the wines nationally."* [Pet. at 3].) The only other record facts developed by Petitioners regarding out-of-state wineries were eight pro forma winery affidavits indicating they stopped shipping to Indiana consumers on the day the offending Indiana statutes became effective. The court file does not reveal any record facts regarding out-of-state wineries that were developed by Petitioners as a result of nonparty depositions or the subpoena of documents. No experts were designated and no published studies were filed with the district court. *E.g., 44 Liquormart, Inc. v. Rhode Island, supra,* at 493. Further, the district court record does not include any record facts regarding the state mandated trade barriers that confront many small wineries and lie at the heart of the Wall Street Journal and New York Times articles referenced in the Petition. The district court record is also devoid of any record facts regarding state mandated protectionism and how it operates to the benefit of in-state wholesalers.

The Petitioners developed even fewer record facts regarding out-of-state wine retailers. A review of the district court record, including exhibits used for summary judgment, did not reveal any affidavits from out-of-state wine retailers, nor did the district court record indicate that Petitioners developed any record facts regarding out-of-state retailers by deposition or the subpoena of documents. The only facts appearing in the record concerning out-of-state wine retailers are those found in the affidavits of several of the Petitioners to the effect they had previously purchased wine from out-of-

state retailers and could no longer do so because of the enactment of the challenged statutes.[5]

"Wise adjudication has its own time for ripening." *Maryland v. Baltimore Radio Show, Inc.* 338 U.S. 912, 918 (1950) (Frankfurter, J.). This issue should wait for another day. Currently, six other cases are pending in the district courts regarding interstate consumer wine sales and shipments.

Dickerson v. Bailey, 87 F.Supp.2d 691 (S.D. Tex. 2000)

Bolick v. Roberts, No. 3:99 CV 755 (E.D. Va.)

Swedenburg v. Kelly, No. 00 CV 778 (S.D.N.Y.)

Heald v. Engler, No. 00 CV 71438 (E.D. Mich.)

Beskind v. Hunt, No. 3:00 CV 258 (W.D.N.C.)

Bainbridge v. Bush, No. 99-CV-2681 (M.D. Fla.).

Wineries are plaintiffs in five out of six of these cases. In the sixth case, the consumer plaintiffs developed a comparable record by taking advantage of the willing buyers' and willing sellers' *mutuality of interest, see, General Motors Corp. v. Tracy,* 519 U.S. 278, 287 (1997), in order to broaden the record. In several of the above cases, there has been extensive discovery and fact development relating to the economic and legislative issues not addressed

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[5] The Petitioners' treatment of out-of-state wine retailers is difficult to explain. The focal point of the Petition is the preferential treatment afforded in-state retailers as opposed to out-of-state retailers. Petition at 2, fn. 1.

in this case. At the present time, no conflict exists between the circuits and no federal statute is at issue in this case.

CONCLUSION

As a prudential matter those most burdened by the Indiana statute and best able to argue the issue are not before the Court. It is the small winery and the independent wine retailer that have the greatest economic interest in the outcome of this case. By granting certiorari, those with the most at stake will be deprived of the opportunity to develop the record on which this important issue regarding the interplay between the Commerce Clause and the Twenty-first Amendment will be decided. We submit, in the interests of justice, this question should be given the opportunity to ripen by waiting for a case where the necessary plaintiffs are before the Court and the record is complete. It should not take long.

WHEREFORE, Amicus respectfully asks the Supreme Court to deny the petition for writ of certiorari.

March 22, 2001

Respectfully submitted,

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MOTION FILED
MAR 19 2001

No. 00-1323

In The

Supreme Court of the United States

RUSSELL BRIDENBAUGH, JIM DAVIS, JOHN DAVIS, MELISSA DAVIS, WILLIAM H. FRIDAY, GREGORY KASZA, JOSEPH KEOUGH, LOYCE KEOUGH, DAVID SABBAGH, JOHN SCANLAN, LINDA SIMON, ROBERT SWANSON, AND MARTHA SYKES,

Petitioners,

v.

STEVE CARTER, ATTORNEY GENERAL OF INDIANA; AND GLENN LAWRENCE, DIRECTOR OF THE INDIANA ALCOHOLIC BEVERAGE COMMISSION, IN THEIR OFFICIAL CAPACITIES; AND WINE & SPIRIT WHOLESALERS OF INDIANA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

MOTION OF DAVID LUCAS AND JUANITA SWEDENBURG FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF AND BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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MOTION OF DAVID LUCAS AND JUANITA SWEDENBURG FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

David Lucas and Juanita Swedenburg have requested the consent of the parties to file an *amicus curiae* brief in opposition to the Petition for a Writ of Certiorari. The petitioner has declined to consent, and the respondents have not responded to the request.

Therefore, pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, David Lucas and Juanita Swedenburg hereby move this Court for leave to file the following *amicus curiae* brief in opposition to the Petition for a Writ of Certiorari.

The *amici* are the proprietors of two small, family-owned wineries located in Virginia and California, respectively. They are plaintiffs in *Swedenburg v. Kelly*, No. 00 Civ. 778 (S.D.N.Y., filed February 3, 2000), referenced in the Petition for Writ of Certiorari at 4. They are challenging New York's three-tier system of alcohol distribution, as it applies to prohibit out-of-state wineries from selling and shipping wine to New York consumers, as a violation of the Commerce Clause, U.S. Const. art. § 8. cl. 3; and the Privileges and Immunities clause, U.S. Const. art. 4, § 2, cl. 1. See *Swedenburg v. Kelly*, 2000 U.S. Dist. LEXIS 12758 (S.D.N.Y. Sept. 5, 2000) (denying motion to dismiss).

The object of *amici*'s lawsuit – to remove protectionist, discriminatory barriers to the interstate trade of wine – is the same as the objective sought by the lawsuit here. As a result, *amici* have a direct and tangible stake in the

outcome of the present litigation and in the decision by this Court whether to grant the Petition. In addition, the granting of this motion will not cause any harm or prejudice to any other party or *amicus*. David Lucas and Juanita Swedenburg's motion for leave to file an *amicus curiae* brief in opposition to the petition for a writ of certiorari in this case should accordingly be granted.

Respectfully submitted,

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INTEREST OF *AMICI*

As set forth in the motion for leave to file this brief, *amici* are the proprietors of two small, family-owned wineries located in Virginia and California, respectively.[1] They are plaintiffs in *Swedenburg v. Kelly*, No. 00 Civ. 778 (S.D.N.Y., filed February 3, 2000), referenced in the Petition for Writ of Certiorari at 4. They are challenging New York's three-tier system of alcohol distribution, as it applies to prohibit out-of-state wineries from selling and shipping wine to New York consumers, as a violation of the Commerce Clause, U.S. Const. art. § 8. cl. 3; and the Privileges and Immunities clause, U.S. Const. art. 4, § 2, cl. 1.[2] See *Swedenburg v. Kelly*, 2000 U.S. Dist. LEXIS 12758 (S.D.N.Y. Sept. 5, 2000) (denying motion to dismiss).

The object of *amici*'s lawsuit – to remove protectionist, discriminatory barriers to the interstate trade of wine – is the same as the objective sought by the lawsuit here. As a result, *amici* have a direct and tangible stake in the outcome of the present litigation and in the decision by this Court whether to grant the Petition.

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[1] This brief was not authored, in whole or in part, by counsel for a party. No person or entity, other than the *amici curiae* and their counsel, made a monetary contribution to the preparation or submission of the brief.

[2] They also challenge restrictions on speech relating to products and sales as a violation of the First Amendment.

ARGUMENT

THIS CASE IS NOT THE APPROPRIATE VEHICLE FOR THIS COURT TO ADDRESS THE IMPORTANT QUESTION OF WHETHER A STATE MAY ENACT PROTECTIONIST AND DISCRIMINATORY BARRIERS TO DIRECT INTERSTATE SALES AND SHIPMENTS OF WINE.

Amici agree with petitioners that this case presents important issues going to the central purpose of the Commerce Clause: the eradication of parochial trade barriers among states. *The Federalist* No. 22 (Hamilton). Hence, as this Court has held repeatedly, "If a state law purporting to promote [legitimate] purposes is in reality 'simple economic protectionism,' we have applied a 'virtual per se rule of invalidity'." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981) (citations omitted). As petitioners point out, the plethora of trade barriers prohibiting the direct interstate sale and shipment of wine has led to a multiplicity of lawsuits challenging their constitutionality (Pet. 4).

We also agree that the decision below is wrongly decided. Announcing that "our guide is the text and history of the Constitution, not the 'purposes' or 'concerns' that may or may not have animated its drafters," *Bridenbaugh v. Freeman-Wilson*, 237 F.3d 848, 850 (7th Cir. 2000), the court of appeals declined to apply this Court's most on-point precedents vindicating the respective core purposes of the Commerce Clause and the 21st Amendment. See, e.g., *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267 (1984) ("The central purpose of [the 21st Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition").

The court of appeals acknowledged that the state's defense of the direct shipping ban amounted to "a euphemism for reducing competition and facilitating tax collection." *Bridenbaugh v. Freeman-Wilson*, 227 F.3d at 851. However, its novel framework for constitutional interpretation allowed the court to reach a disturbing result: permitting a state to impose a substantial burden on interstate trade based on the loss of tax revenue that might occur if the products at issue were allowed to flow freely across state lines, asserting that "this is precisely what the [21st Amendment] is for." *Bridenbaugh v. Freeman-Wilson*, 237 F.3d at 854. The court's ruling is sharply at odds with this Court's holding that the thirst for tax revenue is not a justification for parochial barriers that discriminate against or unduly burden interstate commerce. See, e.g., *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). Especially in an era of explosive growth in the means of effectuating interstate commerce, such an apparently unprecedented decision could bode seriously adverse consequences.

But troubling and potentially far-reaching as the ramifications of the circuit court's reasoning may be, we believe the Court should await one of the other half-dozen cases presently in litigation to resolve the important issues at stake. For the reasons stated below, this case presents analytical and procedural impediments to a comprehensive decision on the intersection between the constitutional guarantee of freedom of commerce and the state's core powers under the 21st Amendment.

1. No direct circuit split yet exists. As noted above, the decision below stands in direct conflict with U.S. Supreme Court precedents regarding the respective

boundaries of the Commerce Clause and the 21st Amendment. Moreover, in contrast to the Seventh Circuit, other courts of appeals have followed Supreme Court precedents to strike down protectionist trade barriers relating to alcoholic beverages against claims that they were justified by the 21st Amendment. See, e.g., *Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994); *Loretto Winery, Ltd. v. Duffy*, 761 F.2d 140 (2nd Cir. 1985). However, the Seventh Circuit is the first ruling precisely on the constitutionality of prohibitions against interstate sales and shipments of wine. Given the multiplicity of actions pending in district courts around the country raising the same issue, it may be prudent for the Court to wait and see how other courts of appeals address the issue, so as to more precisely frame the issue for resolution.

2. The plaintiffs are not wineries, which raises standing issues. In this action, unlike most of the other pending challenges to direct shipping barriers, the plaintiffs are solely in-state consumers and do not include out-of-state wineries. This anomaly presents the court of appeals with difficult questions of standing. As the Seventh Circuit found, consumers unquestionably possess standing under the Commerce Clause to challenge parochial state trade barriers, because "every interstate sale has two parties. . . . " *Bridenbaugh v. Freeman-Wilson*, 227 F.3d at 850. But the issue of redressability gave the court pause, because the plaintiffs did not challenge the additional requirement that out-of-state sellers obtain permits to distribute alcohol, and it is not clear that such permits are available to out-of-state producers or that such sellers would attempt to obtain them. That meant that an impediment to direct wine shipments would remain in place

even if the challenged statutes were removed. *Id.* at 850-51. Although the court correctly resolved the issue in favor of consumer standing, the only reason that the issue was raised at all is because no wineries appear as plaintiffs. This Court can confront the substantive issue without having to consider the procedural thicket if it waits for a case in which wineries, or wineries and consumers, appear as plaintiffs to challenge the trade barriers.

3. The question of discrimination is not clear. As this Court emphasized in *Clover Leaf*, 449 U.S. at 471, even an incidental burden on commerce triggers scrutiny under the Commerce Clause; but discriminatory burdens trigger a virtual per se rule of invalidity. Cf. *North Dakota v. United States*, 495 U.S. 423, 488 (1990) (Scalia J. concurring) (noting the analytical difference between discriminatory and nondiscriminatory burdens in the context of alcohol distribution). Here, the question looms whether the challenged statutes merely place a burden on interstate commerce or actually discriminate against it. The district court found that "these statutes on their face discriminate against out of state commerce." *Bridenbaugh v. O'Bannon*, 78 F. Supp. 2d 828, 832 (N.D. Ind. 1999). By contrast, the court of appeals asserts that there is no discrimination and that "Indiana insists that every drop of liquor pass through its three-tiered system. . . . " *Bridenbaugh v. Freeman-Wilson*, 227 F.3d at 853.

The court of appeals' assertion of nondiscrimination is plainly belied by the facts, given that "holders of Indiana wine wholesaler or retail permits may deliver directly to consumers' homes," *id.*, which is a privilege that out-of-state producers, wholesalers, and retailers do not enjoy. But the court of appeals notes that

> plaintiffs are consumers, and that the statutory conflict does not disable any wholesaler from importing liquor to Indiana and reselling to consumers. Plaintiffs do not complain about the statute that apparently limits distribution permits to Indiana's citizens. These plaintiffs are concerned only with direct shipments from out-of-state sellers who lack *and do not want* Indiana permits.

Id. at 854 (emphasis in original).

It seems apparent that a statutory scheme that treats out-of-state and in-state sellers differently is inherently discriminatory. But because the plaintiffs here are consumers, not wineries, the court was able to somehow transform a discriminatory statute into a nondiscriminatory one. While we disagree with the court's sleight of hand, the issue of discrimination would be more crisply presented if it were raised by a winery, whose desire to ship directly to out-of-state consumers is statutorily unrequitable while in-state sellers may obtain the privilege to do so. That factual scenario is presented in other pending cases but not here.

4. No privileges and immunities claim is presented. No claim is raised here under the Privileges and Immunities Clause. As this Court declared in *Toomer v. Witsell*, 334 U.S. 385, 396 (1948), "one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on the terms of substantial equality with the citizens of that State." That is precisely what is occurring in this case – but because plaintiffs are consumers, not out-of-state businesses, they cannot allege it.

Although the Privileges and Immunities Clause and the Commerce Clause have "a mutually reinforcing relationship," see *Hicklin v. Orbeck*, 437 U.S. 518, 531 (1978), they are analytically distinct. For one thing, Congress cannot expand state authority as against the privileges and immunities of citizenship, as it can in exercising authority under the Commerce Clause. For another, the 21st Amendment limits the scope of the dormant Commerce Clause, but it does not limit other constitutional protections. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976). Hence with regard to privileges and immunities, there is no question, as there is in the interstate commerce context, of the respective spheres of two constitutional provisions: the Privileges and Immunities Clause retains its full vitality. This Court should await an opportunity to consider a Privileges and Immunities challenge; or at least to inform its Commerce Clause analysis with an appreciation of the limits that the Privileges and Immunities Clause necessarily places upon the 21st Amendment.[3]

5. The record does not seem sufficient to review the court of appeals' conclusion regarding taxation. It is not clear whether the Seventh Circuit employed casual Commerce Clause scrutiny because of its determination that the Indiana statutes were nondiscriminatory; or alternatively whether it determined that the state's interest in

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[3] Indeed, the Privileges and Immunities Clause provides additional and independent support for the Court's recognition in *Bacchus Imports* and elsewhere that the 21st Amendment does not create a safe constitutional harbor for protectionist state regulations of interstate commerce in alcoholic beverages.

tax revenue is sufficient to overcome the virtual per se rule of invalidity that is triggered by a discriminatory trade barrier. Either way, however, plainly the crux of its holding is that Indiana's statutory scheme "channels [out-of-state wineries'] sales through Indiana permit-holders, enabling Indiana to collect its excise tax equally from in-state and out-of-state sellers." *Bridenbaugh v. Freeman-Wilson*, 227 F.3d at 854. Even if this is a permissible basis for burdening or discriminating against interstate trade – a dubious and novel proposition – it is not clear whether the record supports the conclusion. The district court opinion makes no findings on whether the state might have alternative means – such as use taxes or permit fees – that might fulfill its revenue goals in a manner that is less burdensome to interstate commerce; and although the court of appeals concludes that this is the "one real economic effect" of the challenged scheme, *id.*, neither it nor the district court cites anything other than the statutes themselves for their determinations of economic effect. Were this Court to consider the tax revenue issue to be in play as a defense to the trade barrier, at best it would have to remand the case for further factual development on the real economic effects and the existence or lack thereof of less burdensome alternatives.

CONCLUSION

We ardently agree with petitioners that this case raises important issues of free trade, and that the decision below contradicts precedents of this Court and visits a manifest injustice upon both producers and consumers. We believe, however, that numerous aspects of this case

counsel the Court to await a different case that more crisply presents the important issues arising from pervasive parochial barriers now afflicting the interstate wine trade. Given the multiplicity of pending challenges to such barriers, the Court should not have to wait long for a better case.

Respectfully submitted,

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